

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

## **POSITION OF DEFENDANT WITH RESPECT TO SENTENCING FACTORS**

NOW COMES Mr. Eric Smith, through his counsel, Assistant Federal Public Defender Akin Adepoju, and pursuant to Fed. R. Crim. P. 32(f), U.S.S.G. § 6A1.2, and L.Cr.R. 32(C)(4), respectfully submits the Position of Defendant with Respect to Sentencing Factors:

## I. STATEMENT OF COMPLIANCE

1. Counsel has conferred with prosecution counsel, and the United States Probation Officer about the Presentence Report (“PSR”) filed at Docket No. 28 and its contents to resolve disputed issues in the Presentence Report.

## II. **OBJECTIONS**

2. Mr. Smith has pleaded guilty to possession of an unregistered destructive device, in violation of 26 U.S.C. § 5861(d). As a result, the PSR increased the base offense level by 6-levels pursuant to U.S.S.G. § 2K2.1(a)(4)(B)(i)(II) and (ii)(I) asserting that the item possessed is a “destructive device” as “described in 26 U.S.C. §5845(a).” See PSR ¶ 13 (increasing base offense level from 14 to 20).

3. Notwithstanding the significantly increased offense level, the PSR applies another 2-level enhancement because “the offense involved a destructive device other than a destructive device referred to in subdivision (A)” pursuant to USSG § 2K2.1(b)(3)((B). See PSR ¶ 14 (applying 2 level enhancement because the offense involved a destructive device other than a destructive device). This two level enhancement is improperly assessed and is double counting. On one hand, it increases the offense level by 6 because it is a destructive device and on the other, increases it by another 2 levels because it is not a destructive device. This is excessively harsh.

4. The two-level enhancement pursuant to § 2K2.1(b)(3)((B) is improperly assessed. With the proper calculation, the base offense level is increased to 20. With a 3-level reduction, the total offense level is 17 ( $20 - 3 = 17$ ). A total offense level of 17 and criminal history category of VI results in an advisory guideline range of 51-63 months.

Respectfully submitted,

/s/ Akin Adepoju

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